2004

The State of Utah v. Lowell Singleton : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellant, vs. LOWELL SINGLETON, Defendant/Appellee.	Case No. 20040731-CA

REPLY BRIEF OF APPELLANT

AN APPEAL FROM AN ORDER OF DISMISSAL WITH PREJUDICE IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH, UTAH COUNTY, THE HONORABLE ANTHONY W. SCHOFIELD PRESIDING

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ORAL ARGUMENT AND PUBLISHED OPINION REQUESTED

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ARGUMENT

Pursuant to rule 24(c), Utah Rules of Appellate Procedure, the State submits this brief in reply to the new matters raised in appellee's brief.

Defendant argues that no reasonable suspicion existed because "Officer Welcker did not himself seem to believe he had observed specific, articulable criminal behavior on the part of [defendant] to justify effecting a level two detention." Aple. Brf. at 12. Defendant reasons that because Officer Welcker testified that defendant was free to leave, the officer himself must not have believed that he had a reasonable suspicion to stop defendant. Aple. Brf. at 12. This argument is a red herring. The approach an officer takes to investigate suspicious activity has no bearing on whether reasonable suspicion exists. Where reasonable suspicion exists, an officer may choose to detain the suspect or he may choose to engage in a consensual encounter. That decision is wholly discretionary and the officer need not detain a

suspect simply because he can. And the fact that the officer chooses to engage in a consensual encounter does not affect the reasonable suspicion analysis.

Defendant also argues that the officer did not believe there was reasonable suspicion of criminal activity. Aple. Brf. at 12. In support of this claim, defendant points to the following testimony:

Prosecutor:	As you're approaching in your vehicle and stopped your vehicle, did you see anything occur between the two men?
Officer:	There was some hand-to-hand actions. I have no idea what was occurring there other than there was some hand-to-hand actions.
Prosecutor:	In your training and experience as a narcotics officer, could this possibly be an exchange for drugs?
Officer:	It could be.

R. 97: 12. Officer Welcker never testified that there was not reasonable suspicion of criminal activity. He acknowledged that he did not know what the exchange was. But he also testified that the exchange was consistent with a drug transaction. Defendant thus overstates the officer's testimony.

Even had Officer Welcker not believed that reasonable suspicion existed, that belief would not be dispositive. Reasonable suspicion is an objective standard: whether, based on the totality of the circumstances, "the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing." *United States v. Arvizu*, 534 U.S. 266, 273, 122 S.Ct. 744, 750 (2002) (quoting *United States v. Cortez*, 449 U.S. 411, 417-18, 101 S.Ct. 690 (1981)). The officer's evaluation of the facts in light of his or her experience and training is "one of several possible articulable facts a court may consider as part of the totality of the

circumstances." *State v. Warren*, 2003 UT 36, ¶ 21, 78 P.3d 590. However, "no one factor alone is determinative of reasonableness." *Id.*

As discussed in the State's opening brief, Aplt. Brf. at 10-12, the facts here are similar to, if not more compelling than, those in *State v. Beach*, 2002 UT App 160, 47 P.3d 932: the hand-to-hand exchange was consistent with a drug transaction, the transaction occurred in an area where drug deals frequently occurred, and the participants took evasive measures upon noticing the presence of police. Defendant argues that *Beach* is distinguishable because defendant did not run away or walk away rapidly. Aple. Brf. at 11. But while "[h]eadlong flight ... is the consummate act of evasion," any evasive behavior is a pertinent factor in determining reasonable suspicion. *Illinois v. Wardlow*, 528 U.S. 119, 124-25, 120 S.Ct. 673, 676 (2000). Evasion need not be executed with great speed to be suggestive of wrongdoing, e.g., the infamous " slow speed" pursuit of O.J. Simpson in the white Ford Bronco.

Defendant also argues that *Beach* is distinguishable because the vehicles were not obstructing traffic or otherwise in violation of the traffic laws. Aple. Brf. at 11. That factor, however, appears to be of nominal importance in assessing whether there was a drug exchange. *See Beach*, 2002 UT App 160, at ¶ 9. In any event, factors supporting reasonable suspicion are present here where they were not in *Beach*. For example, unlike *Beach*, both suspects in this case took evasive measures: defendant walked away upon noticing the officer's approach and Stephen Lundy walked around the car and began kicking something under the Jeep in the snow. In addition, the transaction occurred late at night with the

vehicle lights off, though the engines were running. This suggests an effort to conceal the nature of their transaction.

Finally, defendant suggests that reasonable suspicion could not exist because the exchange might have been innocent. Aple. Brf. at 12. Reasonable suspicion, however, "'need not rule out the possibility of innocent conduct.'" *State v. Markland*, 2005 UT 26, ¶ 10 (quoting *Arvizu*, 534 U.S. at 277, 122 S.Ct. 744).

CONCLUSION

For the foregoing reasons and those stated in the opening brief, the State respectfully requests the Court to reverse the trial court's order Order of Dismissal With Prejudice and remand this case for further proceedings.

Respectfully submitted June 10, 2005.

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CERTIFICATE OF SERVICE

I hereby certify that on June 10, 2005, I served two copies of the foregoing Reply Brief of Appellant upon the defendant/appellee, Lowell Singleton, by causing them to be delivered by first class mail to his counsel of record as follows:

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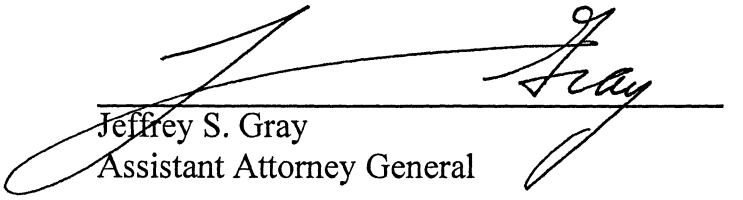

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